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SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1952

NO.....

THE STILLEY PLYWOOD COMPANY, INC.
Petitioner

VS.

THE NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, The Stilley Plywood Company, Inc., respectfully prays certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit affirming, in part, an Order of The National Labor Relations Board (hereinafter called the Board) issued by said Board against The Stilley Plywood Company, Inc., on the 31st day of May 1951, and enforcing the Order of the Board, as affirmed.

Summary Statement of the Matter Involved

This case involves a proceeding brought by the Board against this Petitioner under Section 10 of

the National Labor Relations Act, as amended (61 Stat. 136, 29 USC., Supp. IV, Sect. 151 et seq., hereinafter called the Act) in connection with certain alleged unfair labor practices at this Petitioner's plant at Conway, South Carolina.

Following hearings before a Trial Examiner of the Board, an Intermediate Report and Recommended Order was issued by the Trial Examiner on the 22nd day of August, 1950, in which this Petitioner was directed to cease and desist from unfair labor practices, to bargain in good faith with a labor union which had been chosen as bargaining representative by its employees and to reinstate with back pay certain employees found to have been discriminatorily discharged or denied reinstatement following an alleged unfair labor practice strike (BA 20-141).[1]

In due time this Petitioner filed exceptions to the Intermediate Report and Recommended Order of the Trial Examiner (BA 144-178). Thereafter, the Board, upon review of the matter issued its Decision and Order on May 31, 1951 (94 NLRB 932) affirming, in part, the Intermediate Report and Recommended Order of the Trial Examiner. (BA 179-196).

Thereafter, the cause came on to be heard before the United States Court of Appeals for the Fourth Circuit upon a petition by the Board for the enforcement of its Order issued against The Stilley Plywood

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[1] By stipulation and for the purpose of the within petition, the printed record consists, in part, of the Appendix to Board's Brief in the United States Court of Appeals and the Appendix to Stilley Plywood Brief in the United States Court of Appeals. References herein to the Appendix to Board's Brief in the United States Court of Appeals are designated "BA" and references to Appendix to Stilley Plywood Brief in the United States Court of Appeals are designated "RA."

Company, Inc. On October 13, 1952, said Circuit Court of Appeals issued its Decree affirming, in the main, the Board's Order and enforcing the Board's Order as affirmed. (Case No. 6411 in the United States Court of Appeals for the Fourth Circuit).

One of the principal issues in the cause involved the contractual arrangement for logging entered into in May of 1948, in the State of South Carolina, between this Petitioner and a former employee of Petitioner, named Graham Holt. (Both Petitioner and Holt are residents of South Carolina.) Prior to April of 1945, Petitioner (which manufactured plywood and lumber from logs) acquired its supply of logs through the means of logging contractors. This was its historic method of getting logs (RA 331-332). In April of 1945, Petitioner undertook logging operations itself for the first time in its history (RA 331-332). At that time, Graham Holt was a foreman for one of the logging Contractors. When Petitioner undertook the logging, Holt, along with former logging contractors, was put on Petitioner's payroll (RA 141-142, 147-148). In 1946 and 1947, before advent of the Union at Petitioner's plant, Petitioner again started contracting its logging to logging contractors and trucking contractors (RA 153, 170-171, 333). In May of 1948 (after the Union had been certified and about the time bargaining negotiations commenced), Petitioner contracted with Graham Holt to have the latter take over the remaining *part* of Petitioner's logging (RA 153, 174, BA 512). Petitioner contends that its contract with Holt was bona fide and that its contract and arrangement with Holt established the latter as an independent contractor. The Trial Examiner concluded that Petitioner's transfer of logging operations to Holt was pretensive and was motivated

by a desire to undermine the Union (to rid itself of Union adherents) and that the contract with Holt did not establish him as an independent contractor (BA 88-91). The Board, with scarcely any comment, affirmed the Trial Examiner with reference to the contractual arrangement between the Petitioner and Holt. Moreover, the Board held that this arrangement constituted a *per se* violation of Section 8 (a) (5) of the Act. (BA 181-182).

The United States Court of Appeals affirmed the findings and order of the Board, except as to the discriminatory discharge of employee, Jethro Rabon. (The Rabon issue is not presently involved). Although the matter of contracting of logging was one of the principal issues in the cause, and although this issue was strenuously argued before the Court, both in the printed Briefs and oral argument, the Court made no reference whatever to this matter in its opinion and decision. Moreover, the United States Court of Appeals made no reference whatever to the decision of the Supreme Court of the State of South Carolina in the case of *McDowell v. Stilley Plywood Company*, 41 S. E. (2nd) 872, in which case the Court of last resort in South Carolina decided that an arrangement similar to the one now under consideration created the relationship of independent contractor. This decision of the Supreme Court of South Carolina was specifically called to the attention of the United States Court of Appeals.

The Evidence

Probably an extended discussion of the evidence would be unwelcome, at least at this stage of the pro-

ceedings. We shall, therefore, treat it as briefly as possible for the purposes of the within Petition.

Prior to May of 1948, Petitioner had contracted with others for part of its logging (RA 170-171, 333, 153). (These were not questioned by the Board). In May of 1948, Petitioner entered into the following contract or arrangement with Graham Holt: Holt was to log for Respondent; Holt was to furnish his log truck and small equipment (such as saws, axes, tools, etc.); Petitioner was to furnish the heavy equipment (such as tractors, loaders and skidders); Petitioner was to furnish the parts for skidders and Holt was to furnish the labor for repairing the skidders (the contract was changed in January 1, 1949, so as to require Holt to maintain all heavy equipment); Holt was paid upon a sliding scale basis at a rate from $15.00 to $25.00 per thousand feet, log measure, including cutting, decking and hauling, the exact price varying from time to time, depending upon logging conditions and the distances of hauling; Holt was to cut timber owned by Petitioner and was given the privilege of buying timber himself and selling it to Respondent. (RA 174, 175, 333, 335; BA 510-512, 532). The agreement between Holt and Petitioner was admittedly a parol one and had no specified period of duration.

At the time Holt commenced logging in May of 1948, he purchased one log truck and one labor truck and two chain saws from the Petitioner. These items were purchased on credit and secured by Chattel Mortgages (RA 175, 332-334). At the same time, Holt took over most of Respondent's logging employees at the same rate of pay. In order to obtain a lower insurance rate the trucks were registered in Petitioner's name so as to be insured under its fleet policy. (Holt paid for this insurance. (RA 334; BA 541). On the

other hand, Holt purchased one chain saw from Dillon Supply Company; he purchased his own small equipment (such as axes, saws and tools); sometime after May of 1948, he purchased other vehicles (not from Petitioner); he purchased, on his own, gasoline, oils and grease and fuels from various sources; he subcontracted parts of the log hauling. (RA 176; BA 519, 516, 513, 514, 515, 510, 526). Holt filed his own unemployment compensation records as an employer and contractor with the South Carolina Employment Security Commission, the North Carolina Employment Security Commission and the Collector of Internal Revenue (under the Federal Contributions Act). (RA 308-309). According to these records, Holt's employees varied in number from time to time and their rates of pay varied. Petitioner had nothing to do with the hiring, laying off and discharging of such employees, nor with their rates of pay; neither did Petitioner direct Holt's employees. (RA 175, 176, 334; BA 510-511, 514, 515, 528, 530).

After May 1948, Holt purchased some timber on his own and sold it to Petitioner at market price. (BA 524; RA 175). He filed his own social security records and paid for preparation of these records. (BA 520). Holt carried his own compensation insurance (BA 519-520). He arranged for his employees to purchase merchandise on credit (BA 517; RA 38). He had repairs to his equipment made at a local garage and paid for the same (BA 516).

Petitioner exercised no control over Holt's operations, except to indicate the tracts of timber to be cut and the sizes and species of timber to be logged (supra).

Petitioner's contract arrangement with Holt was

virtually the same as all other logging contracts which Petitioner had previously made in the period of its entire history (RA 159, 330-335; BA 529). And one of these previous logging contracts which Petitioner had made was passed upon in 1947 by the Supreme Court of South Carolina, in the case of *McDowell v. Stilley Plywood Company, supra.*

Jurisdiction

The Judgment of the United States Court of Appeals was entered October 13, 1952. Jurisdiction of this Court is invoked under Title 28, sec. 1254, United States Code.

Question Presented

The question presented is whether the contract for logging entered into in May of 1948 between the Petitioner and Graham Holt created the relationship of independent contractor and established Holt as an independent contractor.

Reasons Relied Upon for Allowance of Writ

The United States Court of Appeals has decided this matter of local importance in a way which conflicts with applicable local decisions and has based its decision on a misconception of the applicable South Carolina law.

Prayer

Petitioner prays that a proper Writ of Certiorari be issued, directed to the United States Court of Appeals for the Fourth Circuit, that this matter may

be reviewed and reversed, and that such other relief be granted as may be proper.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1952

NO.....

THE STILLEY PLYWOOD COMPANY, INC.
Petitioner

vs.

THE NATIONAL LABOR RELATIONS BOARD

BRIEF IN SUPPORT OF PETITION

Jurisdiction

The Jurisdiction of this Court is invoked under Title 28, sec. 1254, United States Code.

Statement of the Case

This is an unfair labor practice case brought by the National Labor Relations Board (hereinafter called Board) against this Petitioner under Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 29 USC., Supp. IV, Sect. 151 et seq., hereinafter called the Act).

Following the usual proceedings, the Board issued its Decision and Order on May 31, 1951 (94 NLRB 832) in which this Petitioner was directed to cease

and desist from unfair labor practices, to bargain in good faith with the Union and to reinstate, with back pay, certain employees found to have been discriminatorily discharged or denied reinstatement following an alleged unfair labor practice strike (BA 179-196).[1]

On October 8th, 1952, the cause was heard before the United States Court of Appeals for the Fourth Circuit upon a Petition by the Board for the enforcement of its Order issued against this Petitioner. That Court issued its decree affirming, in the main, the Board's order and enforcing the Board's order as affirmed (Case No. 6411 in the United States Court of Appeals for the Fourth Circuit).

One of the principal issues (if not the most important) in this cause involved a contractual arrangement for logging entered into in May of 1948 between this Petitioner and a former employee of Petitioner by the name of Graham Holt. This Petitioner's contention throughout this entire case has been that its contract and arrangement with Graham Holt created the relationship of independent contractor and established Holt as an independent contractor. We have hitherto in the annexed Petition stated, in some detail, the matters pertaining to this issue and in the interest of brevity we will not repeat them at this point.

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[1] By stipulation and for the purpose of the within petition, the printed record consists, in part, of the Appendix to Board's Brief in the United States Court of Appeals and the Appendix to Stilley Plywood Brief in the United States Court of Appeals. References herein to the Appendix to Board's Brief in the United States Court of Appeals are designated "BA" and references to Appendix to Stilley Plywood Brief in the United States Court of Appeals are designated "RA."

Specification of Errors

The United States Court of Appeals for the Fourth Circuit erred in holding that the contract and arrangement entered into in the State of South Carolina, in May of 1948, between Petitioner and Graham Holt, both of whom were residents of said State, for logging to be performed in said State, did not create the relationship of independent contractor and did not establish Holt as an independent contractor; the error being that under the South Carolina law the relationship of independent contractor was created and Holt was an independent contractor.

Argument

This contract for logging entered into between the Petitioner and Graham Holt, in May of 1948, was a South Carolina Contract or Agreement. Both parties to the agreement were residents of said State and the principal place of business of Petitioner was located in South Carolina. Moreover, the agreement was for labor to be performed in the State of South Carolina. And at the time of the hearing in this matter the contract was being performed in the said State.

This matter is, therefore, governed by the law of the State of South Carolina, and in our opinion the United States Court of Appeals has failed to apply the South Carolina law. In fact, the Court below made no reference whatever, in its decision, to this matter of the contracting of the logging and made no reference whatever to the South Carolina law. The lower Court, in affirming the Decision and Order of the Board which disallowed the independent contractorship and which held the agreement to be a *per se*

violation of Section 8 (a) (5) of the Act, has decided an important question of local law in a way which conflicts with applicable local decisions.

In the case of *McDowell, et al v. Stilley Plywood Company, et al*, 41 SE (2d) 872, the Supreme Court of the State of South Carolina had under consideration the construction of a logging contract (nearly identical to the one now in issue) and the question as to whether the relationship of independent contractor existed between Stilley Plywood Company and one Wilbert K. McDowell. While that case involved a proceeding under the Workmen's Compensation Act, it is nevertheless apposite insofar as this instant matter is concerned. It appears from the report of that case that McDowell cut, logged and hauled timber which was owned and furnished by Stilley Plywood Company, although occasionally he bought logs and sold them to Stilley Plywood Company; McDowell's compensation varied from time to time, depending on distances of haul and logging conditions, the exact contract price per thousand feet log measure being determined and agreed upon before logging each tract of land; Stilley Plywood Company designated the tracts upon which logging operations should be performed and designated the sizes and species of timber to be cut and had the privilege of requiring the logger to discontinue logging upon any given tract; McDowell had no written contract with Stilley Plywood Company; McDowell owned some of the equipment used in the logging operations and the other equipment was furnished to him by Stilley Plywood Company; Stilley Plywood Company also advanced money or credit to McDowell for repairs to his individual equipment and these advances were deducted from his earnings; McDowell hired and discharged

the employees working for him and paid these employees. The South Carolina Supreme Court decided that the Stilley Plywood Company did not exercise control or supervision over *the operations* conducted by McDowell, nor did it interfere with the *judgment* or *manner* in which McDowell carried on operations, nor did it have concern with the employment or discharge of workers used by McDowell; and the Court decided that McDowell was, therefore, an independent contractor. The South Carolina Court quoted, with approval, from the North Carolina case of *Hayes v. Board of Trustees of Elon College*, 224 NC 11, 29 SE (2d) 137, 139:

> "It appears from these authorities that the retention by the employer of the right to control and direct *the manner* in which *the details of the work* are to be executed and *what the laborers shall do* as the work progresses *is decisive*, and when this appears it is universally held that the relationship of master and servant or employer and employee is created.
>
> "Conversely, when one exercising an independent employment contracts to do a piece of work according to *his own judgment and methods*, and without being subject to his employer except as to the result of the work, and who has the right to *employ* and *direct the action* of the workmen, independently of such employer and freed from any superior authority in him to say *how* the specified work shall be done or *what laborers shall do* as it progresses, he is clearly an independent contractor.
>
> "The vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee *as to details.*" (Italics supplied).

As we view the matter, there is little, if any, real difference in the contract and arrangement between

Petitioner and Holt in this instant cause and the contract and agreement between Stilley Plywood Company and Wilbert K. McDowell, which was passed upon by the South Carolina Court.

According to Graham Holt's undisputed testimony, he hires his own employees and he discharges and lays them off; and the Petitioner has nothing to do with this hiring, discharging and laying off of Holt's employees (BA 514, 528). According to the undisputed testimony of Petitioner's Superintendent of Logging, W. A. Nelson, this Petitioner has no control over Holt's employees and has nothing to do with the hiring of Holt's employees (RA 175, 185); and neither does Petitioner have anything to do with the rate of pay for Holt's employees, nor with Holt's working conditions (RA 176). According to the evidence of Petitioner's President, W. A. Stilley, Jr., the employees of Holt are not subject to the Petitioner's direction (RA 334). According to Holt's undisputed testimony, he pays his own employees (BA 517). According to Holt's undisputed testimony, he subcontracted parts of the logging operations to others (BA 510-511; RA 176). It is undisputed that Holt arranged for his employees to purchase merchandise on credit (BA 517; RA 38). While Holt, at the very outset of his operations, in May of 1948, took over some of Petitioner's logging employees at the same rates of pay (which was perfectly logical), the number and rates of pay of his employees subsequently varied and fluctuated. This is borne out by the employment records introduced in evidence by Holt at the request of the Trial Examiner (RA 308-309). Petitioner had nothing to do with these employment fluctuations.

It is apparent from this record that the Petitioner did not superintend, control or direct "the manner

in which the details" of Holt's work were executed, nor what Holt's laborers did as the work progressed. It is likewise apparent that Holt did "his piece work according to his own judgment and methods" (RA 175, 176, 334-335; BA 514-515, 534, 543). And these factors, in the language of the South Carolina Supreme Court, are "decisive."

On this issue of independent contractorship, the factor of Petitioner's ownership of most of the timber logged by Holt is not controlling. Neither is it controlling that Petitioner owned and supplied Holt with equipment used in the logging operations; nor is it controlling that Holt obtained financial assistance from Petitioner; nor is it controlling that petitioner designated the sizes and species of timber to be cut. Neither is it controlling that Holt's compensation varied from time to time and that the contract price was agreed upon as each tract of timber was logged. This is clearly supported by the decision of the South Carolina Supreme Court in the case of *McDowell, et al v. Stilley Plywod Company, et al., supra.*

In the case of *Chatman v. Johnny J. Jones Exposition, Inc.*, 47 SE (2d) 302, the Supreme Court of the State of South Carolina, in upholding a relationship of independent contractor, made the following statements:

> "The mere fact that one of the contracting parties is empowered to give general directions as to what is to be done without control over the *methods or means of doing it* does not necessarily have the effect of creating the relation of principal and agent or master and servant. 27 Am. Jur., pages 490 and 491; Annotation 20 A.L.R., beginnnig on page 697." (Italics supplied).

Under the South Carolina law, the contract and

arrangement between Petitioner and Graham Holt clearly created the relationship of independent contractor and established Holt as an independent contractor.

This matter of logging and the validity of logging contracts is one of special significance in this area of extensive lumber enterprises. It is an important question of local law which has been passed upon by the State Court of last resort.

If the United States Court of Appeals for the Fourth Circuit had followed the decision of the Supreme Court of the State of South Carolina, the Order of the Board would have been modified and reversed as to the existence of the status of independent contractor on the part of Graham Holt.

Conclusion

Wherefore, it is respectfully submitted that the writ of certiorari should issue, as prayed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 504

THE STILLEY PLYWOOD COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (P. A. 345)[1] is reported at 199 F. 2d 319. The findings of fact,

[1] By stipulation (P. A. 349), the printed record before this Court consists of two separately paginated volumes: the appendix to the Board's brief in the court below, herein designated "B. A.", and the appendix to the petitioner's brief in the court below, designated "P. A." The proceedings in the court below are bound at, and paginated continuously from, the end of the appendix to petitioner's brief.

conclusions of law, and order of the Board (B. A. 179-199, 20-143) are reported at 94 NLRB 932.

JURISDICTION

The decree of the court below was entered on October 13, 1952 (P. A. 347-348). The petition for a writ of certiorari was filed on December 15, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether substantial evidence on the record considered as a whole supports the finding of the Board, affirmed by the court below, that the relationship of one Graham Holt to petitioner was that of foreman rather than that of independent contractor.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 10-12.

STATEMENT

In the spring of 1947, the International Brotherhood of Pulp, Sulphite & Paper Mill Workers of the United States and Canada, A. F. L., hereafter called the Union, began an organizational campaign at petitioner's plant and shortly thereafter requested petitioner to bargain with it (B. A. 25). Upon petitioner's refusal to bargain with the Union until it had been certified by the Board as

exclusive representative, the Union filed a representation petition with the Board, and the Board directed that an election be conducted among petitioner's production and maintenance employees, including its woodland or logging employees, to determine whether or not they desired to be represented by the Union (B. A. 48-51). At the representation hearing, petitioner agreed that the bargaining unit should include the employees engaged in its woodland operations, and stated that no substantial decrease in the number of its employees was contemplated (B. A. 83-84). The Union won the ensuing election and it was certified as the representative by the Board (B. A. 49).

The Board found that before the election petitioner engaged in interrogation, surveillance, and threats designed to prevent unionization of the petitioner's employees (B. A. 27-30, 180-181). The Board further found that after the election, and before the Union was certified on April 12, 1948, petitioner engaged in similar conduct (B. A. 30-37, 180-181). In addition, the Board found that subsequent to the Union's certification, during protracted negotiations covering a period of nearly one year, petitioner's entire course of conduct evidenced an intention to avoid reaching any agreement with the Union (B. A. 52-69). Such conduct included, among other things, the abrupt discharge of two of the Union's negotiators (B. A. 58, 91-96), the refusal to furnish the Union with wage data needed for purposes of bargaining (B. A. 56-59, 62), the adoption of a wage reduction without

consulting the Union (B. A. 66-67), and the refusal to reinstate a number of employees who had struck because of petitioner's refusal to bargain in good faith (B. A. 109-131). Finally, the Board found that, as part of petitioner's failure to bargain in good faith, petitioner refused to bargain with the Union concerning the logging employees whom the Board had included, without objection by petitioner, in the appropriate unit represented by the Union (B. A. 80-91, 181-182).

Petitioner does not dispute the Board's findings except with respect to petitioner's obligation to bargain with the Union concerning the logging employees. Petitioner urges that because of a change in operations these employees ceased to be in its employ and became employees of an independent contractor. The Board's findings of fact on this issue may be summarized as follows:

Subsequent to the Union's certification, petitioner and the Union met briefly on May 1, 1948, when they set May 10 as the date for the commencement of contract negotiations (B. A. 52). However, before May 10, without consulting the Union, petitioner entered into an arrangement by which its foreman, Graham Holt, purported to take over petitioner's logging operations as an independent contractor (B. A. 84).[2] Until then, Holt had super-

[2] Throughout the negotiations, petitioner insisted that the unit to be covered by any contract should be "the regular employees of the Stilley Plywood Company, Inc., normally engaged in production and maintenance in the Employer's Plant and woodland operations, insofar as these operations are continued by the Company" (B. A. 54, 58-60).

vised the logging operations under the general direction of petitioner's logging superintendent (B. A. 82; 269). Pursuant to an oral understanding, terminable at will, Holt, who has never contracted to cut timber for anyone other than petitioner, agreed to handle petitioner's logging operations on a piece-rate basis, and took over almost all of petitioner's logging employees at the same rate of pay they were then receiving (B. A. 84, 86, 89-90; 518, 523, 526, 529). This ostensible transfer produced virtually no change in the method of conducting the logging operations. As in the past, petitioner's superintendent of logging designated which of petitioner's tracts was to be logged and gave Holt instructions regarding the size and kind of timber to be cut (B. A. 89; 522, 534). In addition, petitioner's superintendent informed Holt how much he would be paid for the logs, and Holt testified that he was always satisfied with the price (B. A. 89-90; 526-527, 542-543).

Holt had almost no equipment when he entered this arrangement. Petitioner sold several trucks to him on credit, taking back chattel mortgages as security. Although petitioner claimed that these trucks were subsequently paid for, at the time of the hearing they were still registered in petitioner's name, carried petitioner's license plates, and were covered by insurance taken out in petitioner's name (B. A. 86; 540-541; P. A. 33-334). In addition, Holt purchased some of his gasoline and oil from petitioner's company store on credit, and truck replacement parts purchased by Holt were often

billed to petitioner, which then deducted their cost from sums due Holt for the logging (B. A. 87-88; 515-516, 534). Petitioner also supplied Holt with all the heavy equipment used for logging, and until January 1949, furnished the parts and maintenance for such equipment (B. A. 87; 510, 525). After that date Holt was required to maintain this equipment himself, but the mechanic hired by Holt admittedly did all his work in petitioner's repair shop, used petitioner's equipment and tools, and often obtained parts from petitioner's maintenance foreman (B. A. 87; 528, 533). Holt also purchased two of the three chain saws used for logging from petitioner on credit, and used petitioner's shop facilities for sharpening and maintaining these saws (B. A. 87, n. 51; 435, 519).

At the hearing, Holt showed a considerable lack of knowledge of matters which, as the Board found, a genuinely independent contractor would ordinarily know. He did not know the conditions under which petitioner could terminate their arrangement or even that it was terminable at will (B. A. 89; 523). Moreover, he was unable to state whether he pays business taxes as an independent contractor, whether he is registered as such in his county, or whether his equipment is covered by insurance (B. A. 89; 519, 540-541). Holt further stated that he does not maintain a separate bank account in connection with the logging operations and that his bookkeeping is performed in petitioner's office by petitioner's bookkeeper for a monthly fee (B. A. 88, n. 53; 520, 605).

The Board found that Holt did not have the status of an independent contractor; that the logging employees thus remained in petitioner's employ; that the arrangement between petitioner and Holt was a pretext to avoid bargaining with the Union concerning the logging employees; and that petitioner therefore failed in its obligation to bargain in good faith with the Union as the representative of such employees (B. A. 88-90, 181-182).

With an immaterial modification, the court below, in a *per curiam* opinion, affirmed all of the findings of the Board, holding that "the findings and order of the Board are sustained by substantial evidence on the whole record" (B. A. 346). The court expressly observed that "there can be no doubt that its [the Board's] findings with respect to refusal to bargain in good faith . . . are . . . amply supported" (*ibid.*).

ARGUMENT

Petitioner's sole contention (Pet., p. 11)—that Holt should have been found to be an "independent contractor" who had taken over petitioner's logging employees, rather than merely petitioner's foreman supervising such logging employees—presents primarily a factual issue which does not warrant review by this Court. *National Labor Relations Board* v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756, 757 (C. A. 3), certiorari denied, 342 U. S. 919 (truck drivers); *National Labor Relations Board* v. *Phoenix Mutual Life Insurance Co.*, 167 F. 2d 983, 986 (C. A. 7), certiorari denied, 335 U. S. 845 (insurance salesmen); *National Labor Relations*

Board v. *Blount*, 131 F. 2d 585, 590 (C. A. 8), certiorari denied, 318 U. S. 791 (miners); *Dimmitt-Rickhoff-Bayer Real Estate Co.* v. *Finnegan*, 179 F. 2d 882, 883 (C. A. 8), certiorari denied, 340 U. S. 823 (real estate salesmen). In any event, the Board's findings, sustained by the court below, are amply supported.

Claiming that the question whether Holt is an independent contractor is "governed by the law of the State of South Carolina," petitioner urges that the finding of the Board, affirmed by the court below, is erroneous under South Carolina law (Pet., p. 11). To support its view, petitioner cites *McDowell* v. *Stilley Plywood Co.*, 210 S. C. 173, 41 S. E. 2d 872, contending that a "nearly identical" arrangement was found by the South Carolina Supreme Court to establish an independent contractor relationship for the purpose of the South Carolina Workmen's Compensation Act (Pet., pp. 12-14).

The substantial differences between the facts in the instant case and those disclosed on the face of the opinion in *McDowell* preclude an assumption that the South Carolina courts would hold that Holt acquired the status of an independent contractor. But even if they would, it is settled that local law does not control the determination of a person's status for the purpose of the National Labor Relations Act. "Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be ad-

ministered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems". *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 123; accord: *Rabouin* v. *National Labor Relations Board,* 195 F. 2d 906, 910 (C. A. 2); *National Labor Relations Board* v. *Dalton Telephone Co.,* 187 F. 2d 811 (C. A. 5); *National Labor Relations Board* v. *Blount,* 131 F. 2d 585, 590 (C. A. 8), certiorari denied, 318 U. S. 791.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY, 1953.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other

concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall

cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.* * *

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